

Dr Matthew Butlin,
Presiding Commissioner
SA Productivity Commission

Dear Dr Butlin,

I wish to make a brief submission to the SA Productivity Commission's inquiry into Government Procurement.

Firstly, I believe the Issues Paper is deficient in that it doesn't adequately address environmental considerations in procurement decisions. For example, there is no mention of climate change – which is now almost universally recognised as an existential threat to the planet and the greatest moral challenge of our time. How can that not be an important consideration in procurement? The issue of whether or not social and environmental considerations can or should be taken into account in procurement is decades long. Often the focus is on preferential treatment of local suppliers in support of local jobs. Issues around the environment are less parochial, but are much the same. The argument goes like this:

1. The South Australian government has access to billions of dollars of public money to spend on goods and services in the public interest,
2. The public expect the government to make decisions in the public interest based on environmental, social and economic considerations,
3. The Parliament has directed the government to pay attention to a range of considerations (including the environment and climate change) through both legislation and policy,
4. Therefore, the government should take those obligations into account when making procurement decisions.
5. The Productivity Commission should play a lead role in re-defining relevant procurement considerations to include environmental and social objectives.

Whilst my submission supports taking all social and environmental issues into account in procurement decisions, I offer two specific areas by way of example - climate change and waste / recycling.

Legislation & Policy

As you would appreciate, South Australia has legislated the "Climate Change and Greenhouse Emissions Reduction Act 2007" to:

- "assist in the achievement of ecologically sustainable development in the State by addressing issues associated with climate change"
- "promote commitment to action within the State to address climate change"
- "the development of specific targets (as appropriate) for various sectors of the State's economy"
- "the development of policies and programs for the reduction of greenhouse gas emissions"
- "to promote action within South Australia that provides consistency with national and international schemes designed to address climate change"

Under the Act, one of the tools to be used within government is the development of "Sector Agreements" which set out how various climate change obligations will be met. When the Act was drafted, Parliament agreed that the Government should lead by example by insisting on its own operations entering into "Sector Agreements" in the first year of operation. The Act specifically requires that "The Minister must take steps to achieve a sector agreement with key State Government business enterprises and administrative units by 1 July 2008."

Of course, that date is long gone and was honoured in the breach more than the observance, however the obligation is ongoing. My submission is that the Productivity Commission should adopt the letter and spirit of the law by addressing climate change impacts in its procurement policy review. You might consider your work on developing a new Procurement Policy as including your contribution to a "Sector Agreement" obligation under the Climate Change and Greenhouse Emissions Reduction Act 2007.

In terms of State government policies and strategies to address climate change, these can be found here: <https://www.environment.sa.gov.au/topics/climate-change/programs-and-initiatives>

Trade Agreements, Procurement and the Environment

It is often argued that International obligations under various Trade Treaties must prevail over domestic procurement policies. The argument is most often raised in relation to why it is impossible to include preferential treatment for local companies, local procurement or other environmental or social objectives in procurement decisions.

In the discussion paper, under the heading “Free & Fair Trade”, reference is made to various submissions to the Federal Parliamentary inquiry from 2017:

“the SMEs and their representative business organisations like AUSBUY, AUSVEG, the Australian Information Industry Association and the Australian Paper Manufacturers have indicated that international trade rules and free trade agreements are often cited as reasons to exclude any consideration of broader interpretations of value for money or preference for local SMEs in the tender process; these organisations contend that the Australian Government does in fact possess a significant policy scope to discriminate in favour of locally produced goods and services.”

I would agree with that sentiment, but say that it can also be extended to offering preferential treatment to suppliers who have a beneficial (or less harmful) impact on the environment generally and climate in particular.

In my submission these supposed international free trade “obligations” don’t necessarily apply in South Australia. I refer you to another little-known, but important piece of legislation, the South Australian “Administrative Decisions (Effect of International Instruments) Act 1995”.

This Act provides:

3—Effect of international instruments

(1) An international instrument (even though binding in international law on Australia) affects administrative decisions and procedures under the law of the State only to the extent the instrument has the force of domestic law under an Act of the Parliament of the Commonwealth or the State.

(2) It follows that an international instrument that does not have the force of domestic law under an Act of the Parliament of the Commonwealth or the State cannot give rise to any legitimate expectation that —

- (a) administrative decisions will conform with the terms of the instrument; or
- (b) an opportunity will be given to present a case against a proposed administrative decision that is contrary to the terms of the instrument.

(3) However, this Act does not prevent a decision-maker from having regard to an international instrument if the instrument is relevant to the decision.

What this means is that the Productivity Commission is NOT bound by international trade agreements but may take them into account if it chooses. The same applies to international environmental and climate treaties. You can take these into account but can’t be challenged if you don’t. The choice is yours, but given the clear intent of Parliament that South Australia should seek to reduce its emissions and seek to promote a safe climate, I think you have a legal and moral obligation to build these considerations into procurement policies.

Recycling and Waste

One area where procurement can play an important role in both environmental protection and local jobs is in the area of waste and recycling. With the fallout from “China Sword” creating havoc in the waste industry, there is a great opportunity for Government to lead by example. Saving the South Australian recycling industry requires increasing the demand for recycled products. It’s not enough to improve the quality of material being collected and sorted. End-markets for recycled material

actually need to be developed. Doing so will encourage local manufacturers to use recycled material, particularly plastic and paper that was previously being exported to China.

Governments can lead the way. Government can use its purchasing power to help create new markets. Ideally, the government would set mandatory targets for all government departments in relation to the recycled content of materials that they buy directly or that is provided by private contractors. This would include government procurement of paper and other office equipment, hospitality and cleaning contracts, and civil engineering. This would be done in conjunction with local government, and would also include commitments to avoid consumption where possible. Just last week, the 2018 National Waste Policy prepared by the Commonwealth Department of the Environment and Energy, was released. <http://www.environment.gov.au/protection/waste-resource-recovery/publications/national-waste-policy-2018>

The following Principle and Strategy are relevant:

Principle 3: Increase use of recycled material and build demand and markets for recycled products.

Growth in demand for recovered and recycled materials will drive improved resource recovery in Australia. Support for post consumption recovery of products and materials is also required. This includes paper and cardboard, plastic, metal, glass and organics from kerbside collection systems, as well as materials collected from businesses and construction and demolition sites.

Businesses are critical in driving innovation, developing new markets and designing products that maximise recycling opportunities. Individual consumers can also generate bigger markets for recycled goods by choosing products that contain recycled materials.

Governments have an important role to play in supporting markets for recycled goods domestically and internationally. They also develop standards, policies and procurement guidelines that focus on products that include recycled materials.

Strategy 8

Sustainable procurement by governments

All Australian governments consider environmental issues in their approach to goods and infrastructure procurement and promote demand for recycled materials and products containing recycled content.

Also this year, the Senate Environment and Communication Standing Committee released its report on Waste & Recycling Industry in Australia:

https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Environment_and_Communications/WasteandRecycling/Report/c08

Key recommendations included:

8.36 The committee recommends the Australian Government set mandatory targets for all government departments in relation to the recycled content of materials bought directly or provided by private contractors.

8.37 The committee recommends that state and territory and local governments also pursue sustainable procurement policies to ensure strong domestic markets for recycled material.

The effect of the above is that South Australia has been asked to develop procurement policy in this area and the time is right to do so.

Conclusion

Finally, in case this seems all too hard, I remind you that other government agencies have gone down this path before. I refer you to the Sustainable Procurement Guide produced in 2013 by the Commonwealth Department of Sustainability, Environment, Water, Population and Communities. <https://www.environment.gov.au/system/files/resources/7b8df2bd-3bb9-49cc-b417-5f2eb6e0ce37/files/sustainable-procurement-guide.doc>. It's not perfect, but it shows that this area is now mainstream thinking amongst those charged with writing procurement policies.

I look forward to seeing your further work on this important matter.

Regards,
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